

Insights

THE LONG TERM IMPLICATIONS OF PFAS FOR REAL ESTATE IN THE UK

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SUMMARY

Poly- and Perfluoroalkyl substances (“PFAS”) are widely present in soil and groundwater, and the negative human health consequences of this are starting to be understood. There are important implications for anyone with interests in real estate in the UK. This Insight analyses the risks of PFAS in the UK under UK law.

PFAS are a broad class of more than 10,000 synthetic, fluorinated chemicals.

PFAS have had many individual applications in the past (e.g. in cookware, waterproof/stain resistant fabrics, paints, cosmetics, firefighting foams, to name but a few). They are widely present in the environment as a result of the manufacture use and disposal of the products in which they are incorporated.

More recently, PFAS has started to give rise to serious health concerns. We are at a point where, as happened with asbestos previously, very serious restrictions are soon to be put on the manufacture and use of PFAS, and safe levels for the environment are being established.

Where does this leave those with interests in real estate in the UK? PFAS contamination in soil and groundwater raises the prospect of remediation liability for a great many such people, in particular:

- People who caused the PFAS contamination in the first place, for example through the use of firefighting foam, or through spills in manufacturing processes.
- People who exacerbated the danger of PFAS introduced by another person, for example as a result of redevelopment activities.
- People who are the innocent current owners of PFAS contaminated land, where nobody more culpable can be found, or where liability for hazardous substances was expressly transferred to them from the seller.

These people also face the prospect of claims in tort for damages from people alleged to have suffered personal injury or property damage from contamination in soil and groundwater.

The problem with this liability is that it will likely come as a complete surprise to those in the above categories. Polluters are unlikely to have dreamt at the time that their activities with PFAS or PFAS contaminating products would one day result in liability. Developers probably never thought to test specifically for and accommodate PFAS when they bought and/or redeveloped the property. Innocent current owners' due diligence on purchasing the site is unlikely to have encompassed things that were not thought at the time to be risks.

The terms on which property was bought and sold will be very relevant to the question of with whom any PFAS liability ultimately sits. Very commonly, liability for all contamination in the ground is passed on sale from the seller to the buyer via one or more of a variety of contractual and statutory mechanisms. This is good news for sellers. However, before they celebrate “dodging a bullet” it should be noted that these mechanisms do not always effect a complete transfer of liability.

Contractual wordings will often fail to pass on various aspects of PFAS liability at a property, for example in relation to PFAS contamination that has migrated off the property pre-sale, or in relation to PFAS related claims in tort. Statutory transfers (eg via “sale with information”) might not take effect in relation to PFAS where the broad measure of its presence was not adequately revealed to the buyer during the sale process.

In the future, the possibility of PFAS liability will need to be taken very seriously by those with interests in real estate. Properties contaminated by PFAS will give rise to remediation requirements and to civil actions aimed at seeking redress for personal injury and property damage already caused. Civil actions could draw in a range of connected organisations perceived to have been at fault, for example environmental consultants accused of having failed to spot the contamination.

Buyers and their lenders will be more careful as they choose property, and sellers of properties thought to be at higher risk should expect that buyers will want more detailed information, and are likely to argue harder over liability transfer terms and price. Insurers will factor PFAS risks into their decision making.

If the asbestos experience is a sound indicator, PFAS is likely to be an issue for those with interests in real estate for some years to come.

* Please note that this Insight is limited to an analysis of the risks of PFAS in the UK under UK law. Laws applying to PFAS and PFAS contamination in other countries may differ.

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